CHARLES ELMORE CROPLE
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

FRUEHAUF TRAILER COMPANY, a Corporation,
Petitioner,

vs.

ANNA GUSEWELLE, Administratrix of the Estate of Earl Gusewelle, Deceased,
Respondent.

No. 246.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari.

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SUMMARY STATEMENT.

The petitioner prays for issuance of writ of certiorari, directed to the United States Court of Appeals for the Eighth Circuit, to review the opinion and judgment of that Court in the cause entitled, "Fruehauf Trailer Company, a Corporation, Appellant, versus Anna Gusewelle, Administratrix of the Estate of Earl Gusewelle, Deceased, Appellee, No. 14,301 Civil."

The opinion and judgment of the Court of Appeals were rendered on July 3, 1951, and the opinion has not as yet been published.

GROUNDS FOR REVIEW.

The grounds for review set out in the petition are based upon alleged conflicts with certain decisions rendered by the United States Court of Appeals for the Seventh Circuit, and the local law of the State of Michigan as pronounced in a certain decision rendered by the Supreme Court of that State.

JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked on the basis of Title 28, United States Code, Sections 1254 (1) and 2101 (c), and upon Rule 38, Section 5 (b) of the Rules of this Court.

QUESTION PRESENTED.

The question involved concerns the ruling of the Court of Appeals that petitioner was not legally excused as a matter of law from liability growing out of a motor vehicle collision resulting in the death of Earl Gusewelle, on the ground that petitioner's truck driver was confronted with a sudden emergency causing him to act impulsively and instinctively and without negligence on his part. The Court ruled that the issue was factual and was properly submitted to the jury by an appropriate instruction.

SUMMARY OF ARGUMENT AND AUTHORITIES.

I.

In determining the question involved the United States Court of Appeals for the Eighth Circuit was required to view the evidence in the light most favorable to the plaintiff, respondent here.

Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720;
Brinegar v. Green et ux. (8th Cir.), 117 F. 2d 316, 319;
Groening v. Opseta, 323 Mich. 73, 79, 34 N. W. 2d 560.

II.

The opinion and judgment of the Court of Appeals, that petitioner was not legally excused as a matter of law for violation of the Michigan traffic statute on the ground that its truck driver was confronted with a sudden emergency which caused him to act instinctively and impulsively, is not in conflict with decisions of the United States Court of Appeals for the Seventh Circuit, and the decision conforms with the local law of Michigan.

Craddock v. Torrence Oil Company, 322 Mich. 510, 34 N. W. 2d 51;
Gleason v. Hanafin, 308 Mich. 31, 13 N. W. 2d 196;
Wallace v. Kramer, 296 Mich. 680, 296 N. W. 838;
Triestram v. Way, 286 Mich. 13, 281 N. W. 420.

ARGUMENT.

The contentions of petitioner in its petition for writ of certiorari and supporting brief, that the decision of the Court of Appeals conflicts with certain decisions of the Seventh Circuit and the local law of Michigan, indicate a complete misconstruction of the opinion and decision in this case.

Petitioner alleged in the District Court and again in the Court of Appeals that the operator of its motor vehicle was legally excused as a matter of law for violations of the Michigan traffic law; that his act of driving the vehicle on the wrong side of the highway and into Gusewelle's truck was without legal fault on his part, and resulted solely from a sudden emergency created by a passing automobile. On the basis of this contention, the District Court was charged with error in failing to direct a verdict in petitioner's favor in the trial below.

While the facts were undisputed in the sense that substantially all of the evidence was adduced by plaintiff at the trial, the basic question throughout the case has been whether or not petitioner's driver was confronted with such an emergency as to deprive him of ability and time to act, and prevent him from exercising ordinary care required of the circumstances. This was essentially a question of fact, and both the District Court and the Court of Appeals were required to view the evidence and all inferences reasonably to be drawn therefrom in the light most favorable to plaintiff, respondent here. **Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; Brinegar v. Green et ux. (8th Cir.), 117 F. 2d 316, 319; Groening v. Opseta, 323 Mich. 73, 79, 34 N. W. 2d 560.**

Both the District Court and the Court of Appeals found that under the evidence the question involved was one of

fact, and petitioner's defense of sudden emergency was fully submitted to the jury by an appropriate instruction (R. 71, 97-98). The underlying facts and inferences therefrom revealed that the driver of petitioner's vehicle could have discovered the passing automobile in time to have slowed down, or to have veered to the right before there was any danger of collision. While the Fruehauf and Gusewelle vehicles were still some distance apart, the latter was observed in the act of pulling to the right of the travelled portion of the roadway (R. 25, 46), and by glancing to the rear or by observation through the rear view mirror Fruehauf's driver could have discovered the passing automobile. Petitioner's argument that the driver had less than one second to act (Brief, p. 16) is based upon the distance between the vehicles when Fruehauf first veered to the left of the center of the highway, but by that time the passing automobile had completely passed without contact and had straightened out on the highway in front of the Fruehauf truck (R. 46). There was, at least, an inference that Fruehauf's driver in the exercise of ordinary care could have discovered the situation before this moment and while the two trucks were at a greater distance from each other. It is undisputed that the passing automobile was travelling fifty miles per hour, whereas the Fruehauf truck was proceeding at the lesser speed of forty miles per hour (R. 25, 45). The Fruehauf truck did not diminish its speed up to the moment it changed its course across the highway (R. 26). Having had an opportunity to discover the passing automobile before any emergency arose, the driver could have avoided any danger of contact by simply slowing down his vehicle. It is also undisputed that the shoulder and right of way to the right of Fruehauf's truck was clear and driveable for a sufficient distance to allow the vehicle to be swerved to the right, if necessary (R. 24, 65). Furthermore, after the passing automobile had completely straightened out on the high-

way in front of the Fruehauf truck, with both vehicles maintaining their respective speeds of fifty and forty miles per hour, there was no further danger of a collision so long as they maintained these relative speeds, and consequently no sudden emergency. It should be kept in mind that there was no change in the course of petitioner's vehicle until after this latter situation existed (R. 46). Hence, the comment of the Court of Appeals that if petitioner's driver "had not acted at all, there was no possibility that the private car and defendant's truck would collide" (R. 99). The jury were justified in finding on substantial evidence that no sudden emergency existed, so as to cause a change of direction of petitioner's truck.

The testimony revealed that petitioner's vehicle was caused to swerve or "jack-knife" across the road when the driver applied the tractor brakes without simultaneously applying the trailer brakes, and that the jack-knifing could have been corrected instantly by an application of the trailer brake (R. 91, 92, 99).

On the basis of the evidence and under the authorities cited, the Court of Appeals properly held that the issues were factual, and petitioner's claim of conflict is without foundation. It is elementary that in deciding a question of law such as that interposed by petitioner, where the sufficiency and construction of the evidence is involved, each case must be reviewed in the light of its particular facts.

The case of **Pickering v. Carson, 108 F. 2d 546**, from the Seventh Circuit, did not involve the sudden emergency doctrine. There, the defendant's automobile was struck and knocked out of control by another vehicle; there was no "dispute or conflict as to the salient facts," and "there is not the slightest evidence tending to show any negligence on her part." Compare this situation with the evidence reviewed herein which tended to show that peti-

tioner's driver could have discovered the presence of the passing automobile in time to have avoided close proximity by slackening his speed or swerving to the right; could have avoided any sudden or affirmative action after the automobile had safely passed around his vehicle; or could have prevented the swerve or "jack-knife" by simultaneous application of the tractor and trailer brakes.

In **Greyhound Lines, Inc., v. Noller, 36 F. 2d 443,** the passing automobile turned in front of defendant's bus and stopped suddenly without warning, thus requiring some affirmative action on the part of the bus operator. He could not stop, and there was a concrete abutment and ditch to the right which prevented the bus from turning safely in that direction. On review the Court found no substantial evidence of negligence and pointed out that the physical conditions showed "that there was less probability of an accident in the course taken by the driver in the emergency." In the present case, there was no necessity for any affirmative action on the part of the Fruehauf driver after the passing automobile regained its position on the highway in front of the truck and proceeded at a greater rate of speed.

In its claim of conflict with the local law of Michigan, petitioner relies upon the opinion and decision of the Michigan Supreme Court in **Kalso et al. v. Wilson et al., 252 Mich. 520, 233 N. W. 401.** On the particular facts involved in that case, the Court found no evidence of negligence, as the undisputed facts revealed that the defendant-driver was required to take sudden and affirmative action by applying his brakes, thereby causing his car to skid on the slippery pavement. There was no evidence that defendant was driving at an excessive rate of speed or that he failed to have his car under control.

The Michigan Courts fully recognize the requirement that each case must be decided on its own particular facts

in applying the sudden emergency doctrine of excusable conduct, and that frequently the question is for the jury.

In **Craddock v. Torrence Oil Company, 322 Mich. 510, 34 N. W. 2d 51,** cited and relied on by the Court of Appeals (R. 98), the question of plaintiff's own contributory negligence in the face of an emergency was held to be a matter for jury determination. Plaintiff was injured while operating a bus and recovered a judgment against the defendants, who appealed. As he was proceeding along the roadway, he noticed defendants' driverless truck coasting backwardly down the hilly incline of the street toward him. To avoid a collision he swerved to the left and eventually crossed the centerline of the highway where he collided with another bus operated by his employer. The opinion recites:

> "Defendants contend, also, that, as a matter of law, plaintiff was guilty of contributory negligence which was the proximate cause of the collision. Plaintiff, however, claims that he was confronted with peril and danger in an emergency caused by defendant's negligence, and that as a direct result of such emergency the collision occurred. It is true that plaintiff may not invoke the emergency rule if his own negligence actually contributed to bringing about the emergency, and if such negligence was the proximate cause of the collision plaintiff may not recover (citing cases). However, this became a question of fact in the instant case."

In **Gleason v. Hanafin, 308 Mich. 31, 13 N. W. 2d 196,** plaintiff was riding as a guest in an automobile being driven southwardly on U. S. Highway 23, a three-lane concrete highway with adjoining shoulders of gravel. The pavement was dry but the shoulders were damp. The automobile in which plaintiff was riding was being operated on the extreme west or southbound lane. Southbound traffic

was heavy, using both the west and center lanes of the highway. The defendant's automobile was being operated northwardly on the extreme east lane at a high rate of speed. A third automobile passed up both southbound lanes of traffic, partly on the east or northbound lane, and met defendant's car some two hundred fifty to three hundred feet south of plaintiff's automobile. There was a conflict in the testimony as to whether this third automobile sideswiped defendant's car, or had successfully turned back into the center lane before meeting defendant. In either event, these two vehicles succeeded in passing and defendant continued northwardly at a high rate of speed with the two right wheels on the shoulder. It then crossed the entire pavement from the east to the west lane and collided with the automobile in which plaintiff was riding. Defendant testified that she did not remember how she crossed the center lane to collide with plaintiff's car, and there was no explanation why she could not continue north in the east lane, thus avoiding the accident. In upholding the jury verdict against defendant the Court said (308 Mich., loc. cit. 37):

> "There was testimony to go to the jury as to whether defendants were guilty of negligence in the operation of their vehicle, and as to the proximate cause of the accident. While the driver of the third car was probably guilty of negligence if he knowingly drove into the east lane, where he had no right to be, in front of defendant's rapidly moving car, his negligence was not necessarily the sole proximate cause of the accident. There may be two contributing causes of any injury."

Other Michigan decisions recognizing but refusing to apply the sudden emergency doctrine as a matter of law under particular facts are **Wallace v. Kramer, 296 Mich. 680, 296 N. W. 838,** and **Triestram v. Way, 286 Mich. 13, 281 N. W. 420.**

The Court of Appeals did not refuse to recognize the sudden emergency doctrine as a defense under certain circumstances, but, on the contrary, found that such defense was properly submitted to the jury. There is no conflict with the cases cited in petitioner's brief, and the decision is in line with the local law of Michigan.

Respectfully submitted,

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